STATE OF MICHIGAN

IN THE SUPREME COURT

HIGHLAND-HOWELL DEVELOPMENT COMPANY, L.L.C.,

Petitioner-Appellant,

vs.

TOWNSHIP OF MARION,

Respondent-Appellee.

Supreme Court No. 130698

Court of Appeals Docket No. 262437

Michigan Tax Tribunal
Docket No. 307906

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KATHLEEN McCREE LEWIS (P23843)
SHERRILL D. WOLFORD (P44085)
CHRISTINE MASON SONERAL (P58820)
Dykema Gossett PLLC
Attorneys for Petitioner-Appellant
400 Renaissance Center, 34th Floor
Detroit, MI 48243
(313) 568-6577

NEIL H. GOODMAN (P30751)
Clark Hill PLC
Attorneys for Respondent-Appellee
255 S. Old Woodward, Third Floor
Birmingham, MI 48009
(248) 988-5880

RICHARD BISIO (P30246)
Kemp, Klein, Umphrey, Endelman
& May, P.C.
Co-Counsel for Petitioner-Appellant
201 West Big Beaver Road, Ste. 600
Troy, Michigan 48084
(248) 740-5698

/

130698

RESPONDENT-APPELLEE TOWNSHIP OF MARION'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITIONER-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

CLARK HILL PLC

By: Neil H. Goodman (P30751)
Attorney for Respondent-Appellee
255 S. Old Woodward, Third Floor
Birmingham, Michigan 48009
(248) 988-5880

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

STATEMENT OF QUESTIONS INVOLVED

1. In what manner may a property owner subject to a special assessment for a planned improvement seek relief when there is a subsequent change to the plan that materially affects the benefit to the owner's property?

2. Is Respondent-Appellee Township of Marion's May 13, 2004 Resolution ratifying certain plan changes tantamount to a resolution approving plan changes under MCL 41.725(1)(b)?

3. If the answer to Question 2 above is Yes, is Petitioner-Appellant Highland-Howell Development Company, LLC entitled to seek relief under MCL 41.726(3)?

ARGUMENT

Introduction

On June 30, 2006, this Court issued an Order directing the Clerk to schedule oral argument on whether to grant Petitioner-Appellant Highland-Howell Development Company, LLC's ("Highland's") application for leave to appeal or take other peremptory action. The Court directed the parties to include among the matters to be addressed at oral argument three specific issues, and permitted the parties to file supplemental briefs on these issues. Respondent-Appellee Township of Marion ("Township") files this Supplemental Brief in Opposition to Petitioner-Appellant's Application for Leave to Appeal in accordance with the Court's June 30, 2006 Order.

ISSUE 1: IN WHAT MANNER MAY A PROPERTY OWNER SUBJECT TO A SPECIAL ASSESSMENT FOR A PLANNED IMPROVEMENT SEEK RELIEF WHEN THERE IS A SUBSEQUENT CHANGE TO THE PLAN THAT MATERIALLY AFFECTS THE BENEFIT TO THE OWNER'S PROPERTY?

Discussion

The Township understands the Court's use of the phrase "a subsequent change to the plan" to refer to the situation where the plan change occurs more than 30 days after the special assessment has become final and conclusive, thereby precluding an appeal of the special assessment in the Michigan Tax Tribunal. MCL 41.726(3) and MCL 205.735(2). Based on this understanding, the Township will address the question of where and how the property owner can obtain relief when a "subsequent" plan change materially reduces the benefit to its property from the improvement and the property owner can no longer appeal its special assessment to the Michigan Tax Tribunal.

The Township is compelled to begin its discussion of this question by stating that its premise, i.e., a plan change that materially reduces the benefit to the owner's property, did not occur in the case at bar. Notwithstanding Highland's contrary assertion, the removal of the east-west trunk line traversing its property - - unofficially in early 1997 and officially by way of the Township's May 13, 2004 Resolution - - had no effect on the benefit to its property from the sanitary sewer improvement for which it was specially assessed. The reason this is so concerns the undisputed facts that 1) the parties never reached an agreement, by way of an easement or otherwise, which would have **permitted** the Township to come upon Highland's property and construct this trunk line; 2) the parties never reached an agreement, by way of an easement or otherwise, which would have **permitted** Highland to make multiple taps into this trunk line; and 3) the Township never instituted condemnation/eminent domain proceedings to effect a "taking" of Highland's property to the extent necessary to construct the trunk line across it. In short, at no time since the Township presented its original plan for sewer improvements has the Township ever acquired the right to come onto Highland's property to construct the subject trunk line, and at no such time has Highland ever acquired the right to tap into this line.

Accordingly, when the Township changed the plan by eliminating the east-west trunk line traversing Highland's property, it did not affect the benefit to Highland's property because Highland never acquired enforceable rights in this line in the first place.[1] After the line was eliminated, Highland's property remained in the special assessment district, the plan continued to provide for sewer improvements to Highland's property by bringing the sewer line to the

[1] In Highland-Howell Dev Co, LLC v Township of Marion, 469 Mich 673; 677 NW2d 810 (2004), this Court held that Highland's claim for damages arising out of the Township's alleged breach of promise to construct this very same trunk line was not within the exclusive and original jurisdiction of the Michigan Tax Tribunal, and remanded the case to the Livingston County Circuit Court. On remand, the circuit court dismissed this claim on the merits (see Township's Appendix to Brief in Opposition to Highland's Application for Leave to Appeal, Exh. 7), and Highland's appeal of that dismissal was dismissed by Order of the Court of Appeals dated February 22, 2005 (see Township's Appendix, Exh. 10).

property's edge, and Highland's special assessment remained unchanged. When this Court therefore asks where and how "a property owner" may seek relief when a subsequent plan change materially affects the benefit to its property, it is asking about a property owner **other than** Highland.

With regard to the hypothetical property owner who experiences a material reduction in the benefit to its property as the result of a subsequent plan change, the only plan change of which the Township can conceive that would effect a material reduction in the benefit to the property would be one that eliminated the service provided by the improvement **in its entirety**. For example, in the case of sanitary sewer improvements to be provided to specified property owners within a defined special assessment district, the plan either calls for the property to be served by the improvement - - in which case a special assessment is levied on that property - - or not to be served. In other words, the plan either provides for the sewer line to be run up to the edge of the property for connection to the system or it does not; there is no such thing as "partially" serving a parcel of property with sewer service improvements. Thus, the only plan change that could "materially affect the benefit to the owner's property" is one that eliminated the service (in this case sanitary sewer service) for which the property owner was specially assessed.

A township cannot lawfully impose a special assessment on a property owner for a public works improvement and thereafter effect a plan change that deprives the property owner of the service provided by that improvement. Although an appeal of the special assessment in the Michigan Tax Tribunal would be foreclosed by MCL 41.726(3) and MCL 205.735(2) if the plan change was made more than 30 days after confirmation of the special assessment roll, the property owner would still have recourse in a court of competent jurisdiction. In a circuit court

action, the property owner could seek a writ of mandamus compelling the township to construct the improvement for which it has been specially assessed; it could also seek injunctive and declaratory relief relative to the township's obligation to either serve its property with the improvement or void its special assessment. Under this Court's holding in Highland-Howell Dev Co, LLC v Twp of Marion, supra, these are all claims that are beyond the exclusive and original jurisdiction of the Michigan Tax Tribunal.

ISSUE 2: IS THE TOWNSHIP'S MAY 13, 2004 RESOLUTION RATIFYING CERTAIN PLAN CHANGES TANTAMOUNT TO A RESOLUTION APPROVING PLAN CHANGES UNDER MCL 41.725(1)(b)?

Discussion

In its January 27, 2004 Proposed Opinion and Judgment in MTT Docket No. 261431, which was affirmed by an Order entered on March 19, 2004, the Michigan Tax Tribunal ruled that when the Township eliminated the east-west trunk line traversing Highland's property from the sewer improvement plans in mid-1997, it "did not comply with MCL 41.725(b) (sic) because it did not approve the changes to the plan by a resolution." (See Township's Appendix, Exh. 2, p. 21). It further ruled as follows on this subject:

> If changes are made after confirmation of the special assessment roll, the statutory requirement that the board approve plans by resolution still applies. Therefore, before it could amend the plans to eliminate the trunk line, Respondent was required to pass a resolution for that purpose.
>
> Township's Appendix, Exh. 2, p. 26

The Tribunal concluded, however, that the Township's failure to pass such a resolution "does not provide legal authority to excuse the jurisdictional requirements in the Tax Tribunal in this case." (See Township's Appendix, Exh. 2, p. 32).

The Township adopted its Resolution of May 13, 2004 in response to the March 19, 2004 Order of the Michigan Tax Tribunal affirming its Proposed Opinion and Judgment of January 27, 2004. Inasmuch as the Tribunal ruled that the subject plan change needed to be made by a Township Board resolution pursuant to MCL 41.725(1)(b) even though it came after confirmation of the special assessment roll, the Township would conclude in response to this Court's question that this Resolution **is** "tantamount to a resolution approving plan changes under MCL 41.725(1)(b)."

ISSUE 3: IS HIGHLAND ENTITLED TO SEEK RELIEF UNDER MCL 41.726(3)?

Discussion

MCL 41.726(3) sets forth the time limit within which a property owner must file an action to contest its special assessment after confirmation of the special assessment roll. More specifically, this statutory provision states that unless such an action is filed "within 30 days after the date of confirmation," all assessments on the roll "shall be final and conclusive."

In the instant case, it is undisputed that the assessment which Highland sought to contest in the MTT proceeding below is the assessment for sewer improvements, the roll for which was confirmed by the Township on December 2, 1996 (see Township's Appendix, Exh. 3 - - Highland's Petition in Docket No. 307906). It is also undisputed that Highland did not initially file an action contesting this assessment until July 21, 1998 - - more than 1.5 years after

confirmation of the roll (See Township's Appendix, Exh. 2, p. 10, ¶15). Highland's Petition in the instant case was filed 7.5 years after the special assessment roll was confirmed.

As the Michigan Tax Tribunal correctly held in Docket No. 261431 and in Docket No. 307906 below, Highland's assessment became "final and conclusive" under MCL 41.726(3) when Highland failed to file an action contesting the same within 30 days after the roll confirmation date of December 2, 1996 (See Township's Appendix, Exh. 2, p. 13 and Exh. 11, p. 4). By its terms, MCL 41.726(3) is limited to actions contesting special assessments, and has no application to changes in the plans for the improvement for which the special assessment is levied.

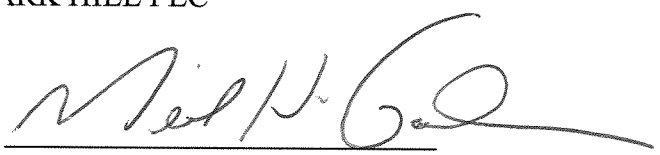
Accordingly, Highland is **not** entitled to seek relief under MCL 41.726(3) based on the content of the Township's May 13, 2004 Resolution - - a resolution that did **not** confirm a special assessment roll.

RELIEF REQUESTED

For the reasons set forth herein and in its Brief in Opposition to Highland's Application for Leave to Appeal, the Township prays for entry of an Order denying leave to appeal in this matter, or, in the alternative, an Order affirming the decision of the Court of Appeals below.

Respectfully submitted,

CLARK HILL PLC

By: 

Neil H. Goodman (P30751)
Attorney for Respondent/Appellee
255 S. Old Woodward, Third Floor
Birmingham, Michigan 48009
(248) 988-5880

Dated: August 10, 2006